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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 386

JOHN H. ROWE,

Petitioner,

vs.

JOHN B. COLPOYS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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The Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia affirming a judgment of the United States District Court for the District of Columbia in the case of John H. Rowe *v.* John B. Colpoys, U. S. Marshal in and for the District of Columbia, et al.

Matter Involved.

An amended complaint was filed in the District Court of the United States for the District of Columbia asking for

damages by reason of the illegal seizure by defendant, John B. Colpoys, U. S. Marshal in and for the District of Columbia, through two Deputy Marshals, upon a fieri facias sued out of the Municipal Court of the District of Columbia March 20th, 1940, by the plaintiff in the case of the Franc Jewelry Company, a corporation, *v.* John H. Rowe and Hazel B. Rowe, at law No. 386986.

On Saturday, April 6th, 1940, two U. S. Deputy Marshals, accompanied by a Metropolitan Police Officer in uniform and an agent of the defendant, the Franc Jewelry Company, entered the place of business, 4408½ Georgia Avenue, Northwest, of petitioner, and remained there from 11 P. M. to midnight. After having made a survey of the barroom a deputy marshal at the direction of the agent of the jewelry company took Rowe's Alcoholic Liquor license off the wall, notifying him and the customers that no beer could be sold because the petitioner had no license. Petitioner offered them $50 and his cash register which they refused. They remained until closing. According to the record, on April 6, 1940, return was made to the Court of the license by John B. Colpoys, U. S. Marshal, E. J. Geraci, Deputy Marshal (R. 35). On the 9th of April, 1940, (R. 11) the license was returned to petitioner by the Marshal at the direction of the representative of the jewelry company, upon payment of $50. From April 6th to April 9th, 1940, petitioner importuned defendant jewelry company and the U. S. Marshal to return the license to him. These offers were scornfully refused by the Marshal acting under the direction of the jewelry company. They demanded $100 as the price for the return of the license. Nevertheless, on April 9, 1940 (R. 11) it was returned to the petitioner on payment of $50 to the U. S. Marshal by direction of the Franc Jewelry Company although the judgment was $133 with interest and attorney's fee. The seizure took place on Saturday night, the

busiest time of the week and in the presence of from 40 to 50 customers.

On one occasion when petitioner called at the office of the jewelry company the man in charge said: "The next time I will take your license away and close you up unless you pay $100" (R. 12). This is the same man who went with appellant to the Marshal's office and to whom he appealed twice before, and who had been in charge of the jewelry company's business behind the counter on each occasion. The "levy (was) released by order of attorney for plaintiff" (R. 35), who is also counsel for the Jewelry Company in this case. The return on the writ and the release are both signed by John B. Colpoys, United States Marshal by E. J. Geraci, Deputy.

Jurisdiction.

The Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended February 13, 1925 (U. S. C. Title 28, Section 34) and rule 38 of the Revised Rules of the Supreme Court of the United States, (p. 32), which reads as follows:

> "Where that Court (United States Court of Appeals for the District of Columbia) has not given proper effect to an applicable decision of this Court." Hooey v. Wilson, 76 U. S. 504; L. Ed., 762; Missouri, Kansas and Texas Railway Company, 226 U. S. 570; 57 L. Ed. 355.

The Court of Appeals failed to give consideration to prior decisions of the Courts of the District of Columbia.

Hart v. *Pierce*, 42 W. L. R. 825;
Richards v. *Geiger*, 39 D. C. App. 278, 40 W. L. R. 758;
Crowley v. *Christensen*, 137 U. S. 86, 34 L. Ed. 620.

Statement of Case.

Trial Court held the seizure of the liquor license was illegal, but dismissed the complaint because, as he alleged,

no damages by way of "profits" had been shown. Shortly after the reopening of the business complainant was evicted for non-payment of rent and all of his books and records were lost. It was contended however that complainant was entitled to compensatory and/or punitive damages.

The Legality of the Seizure of the License.

This is the only question passed upon by the Court of Appeals, which said:

> "This case presents for the first time in this jurisdiction a question of whether or not a license to sell alcoholic beverages issued by the Alcoholic Beverage Control Board is subject to levy under execution to satisfy a judgment of the Municipal Court of the District of Columbia. The trial court assumed that it was not, but directed a verdict against appellant upon the question of damages. * * * The license involved in the present case should be subject to levy" (R. 44, 47).

There is no case in the District of Columbia Courts, or elsewhere holding that a liquor license is "subject to levy on execution" and sale by a U. S. Marshal and the Court of Appeals cites none.

At the trial the Court below relied upon the case of *Hart v. Pierce*, 42 W. L. R. 825, in which Mr. Justice Stafford said:

> "The defendant is the proprietor of a bar room license and the motion (to quash a writ of execution) is directed against the Marshal levying the said license on the ground that it is *not goods and chattels* within the meaning of Section 1082 of the Code * * *. It has been repeatedly held and is undoubtedly the law that a liquor license is a privilege and not a right. * * * The motion must be granted."

Section 1082 of the then District Code is now Title 15, Section 210, 1940 and reads as follows:

> "The writ of fieri facias may be levied on all goods and chattels of the debtor not exempt as aforesaid."

The following case was also cited to the trial court: *Richards* v. *Geiger,* 39 App. D. C. 278:

> "A license to sell intoxicating liquors is a mere permit personal to the licensee and is not transferrable unless the right is expressly conferred by statute; and then only upon compliance with the provisions of the statute relating to the transfer."

The statute, Alcoholic Beverage Control Act, provides:

Section 6. "The right, power, and jurisdiction to issue, transfer, revoke, and suspend all licenses under this Act shall be vested solely in the Board."

Alcoholic Beverage Control Regulations, Section 8(a) "Every person receiving a license to manufacture or sell beverages shall frame the same under glass and post it conspicuously in his place of business."

Alcoholic Beverage Control Regulations, Section 17. "*Licenses may be transferred only upon the written request of the licensee and the transferee shall comply with all the requirements of the act respecting the granting of original licenses.*"

Alcoholic Beverage Control Regulations, Section 33. "Whosoever violates any of the provisions of this Act for which no specific penalty is provided, *or any of the rules and regulations promulgated pursuant thereto,* shall be punished by a fine of not more than $1,000 or by imprisonment for not longer than one year or by both such fine and imprisonment in the discretion of the Court."

Section 13, Alcoholic Beverage Control Act. "Every license shall particularly describe the place where the rights thereunder are to be exercised, and beverages

shall not be manufactured or kept for sale or sold by any licensee except at the place so described in his license."

Section 14 (a), Alcoholic Beverage Control Act. "Any individual, partnership, or corporation desiring a license under this Act shall file with the Board an application in such form as the Commissioners may prescribe, and such application shall contain such additional information as the Board may require, and * * * shall contain a statement setting forth name and address of the true and actual owner of the premises upon which the business to be licensed is to be conducted. Before a license is issued the Board shall satisfy itself: * * *"

Paragraph 3 of Sec. 14 "Except in the case of an application for solicitor's license, that the applicant is the true and actual owner of the business for which the license is desired, and that he intends to carry on the business authorized by the license for himself and not as the agent of any individual, partnership, association or corporation, and that he intends to superintend in person the management of the business licensed, or intends to have some other person to be approved by the Board manage the business for him, which said manager must possess all of the qualifications required of a licensee hereunder."

Paragraph 5 (b) of Sec. 14. "Before granting a retailer's license * * * the Board shall give notice by advertisement published once a week and for at least 2 weeks in some newspaper of general circulation published in the District of Columbia. The advertisement so published shall contain the name of the applicant and a description by street and number or other plain designation, of the particular location for which the license is requested, and the class of license desired. * * * There shall also be posted by the Board a notice in a conspicuous place on the outside of the premises. This notice shall state that remonstrants are entitled to be heard before the granting of such

license, and shall name the same time and place for such hearing as set out in the public advertisement; and if remonstrance against the granting of such license is filed, no final action shall be taken by the Board until the remonstrant shall have had an opportunity to be heard under rules and regulations prescribed by said Board. * * *"

Paragraph 5 (c) of Sec. 14. "* * * No place for which a license under this Act has not been issued and in effect on the date written objections hereinafter provided for are filed, shall be deemed appropriate if the owners of a majority of the real property within a radius of 600 feet of the boundary lines of the lot or parcel of ground upon which is situated the place for which the license is desired, shall, on a form to be prescribed by the Commissioners and filed with the Board, object to the granting of such license. In determining the sufficiency of such objections the owners of all such property not lying within a residential use district as defined * * * shall be taken as consenting to the granting of such license, except that the Commissioners shall have power to file objections on behalf of any property lying within such radius owned by the U. S. or the District of Columbia."

Paragraph 5 (d) of Sec. 14. "A separate application shall be filed with respect to each place of business * * * In the event the license is denied the fee shall be returned. Each application * * * shall be accompanied by a bond on a form to be prescribed by the Commissioners executed by the applicant with corporate surety approved by the Board in the penal sum of $1,000 * * *, conditioned upon the payment by the applicant of any and all taxes due the District of Columbia under this Act. * * *"

Section 16. "No license shall be transferred by the licensee *to any other person or to any other place, except with the written consent of the Board, upon a regular application therefor in writing and after notice and hearing, as herein provided for an original application for license* * * *."

It is evident from the foregoing quotations that the U. S. Marshal could by no possibility pass title to this license. Trial Court: (R. 25) *I am of the opinion that the levy and seizure of liquor license was wrongful and that any damages flowing therefrom are recoverable.* Mr. Laskey, Assistant U. S. Attorney: "*Frankly, I don't think they had any right to levy on the license.*" (R. 22) The Court: "*They couldn't sell it; it had no value; it couldn't be sold; why did they take it.*" (R. 22) Mr. Laskey: "*I don't think that the license itself could be, and I am not prepared to take that position that a license is subject to levy because I don't think it is.*" Counsel for the defendant Jewelry Company did not dispute the opinion of the trial court and counsel for the U. S. Marshal, but contends that the frame and paper writing enclosed therein is goods and chattels. In its brief below counsel for the jewelry company said: "If this Court should hold that the certificate representing an Alcoholic Beverage Control license (D) encased in a picture frame was not 'goods and chattels' of the appellant within the meaning of Section 210 of Title 15 of the District of Columbia Code, (supra) there was no evidence in the case which would entitle appellant to punitive or compensatory damages." * * * The appellee jewelry company says on page 8 of its brief in the Court of Appeals: "When the Marshal first entered appellant's place of business for the purpose of execution on the writ of *fieri facias* appellant requested the Marshal not to take his license for the reason that it would prevent him from selling beer."

What Is the Effect of Seizing the License.

The Deputy Marshal and the agent of the Jewelry Company knew that the petitioner must close up as far as the sale of liquor was concerned, and without a liquor beverage these small places could not exist. The sale of beer was prohibited by the Deputy Marshal. When he took posses-

sion at the direction of the jewelry company, it thereby expected to bludgeon the keeper into submission, but Rowe could not come across. *This kind of duress could only be worked on one who must have a license to operate. This Court should therefore intervene on behalf of the entire retail liquor business, or perchance any other avocation that must have a license not only in Washington but throughout the country. If this decision stands any brewery or distillery could hold it over the head of every liquor retailer to pay or get out of business.* A distraint never intended by any law, completely disregarding all legal exemptions.

Is Liquor License Property.

The Court of Appeals seems to think there is some kind of incorporeal property right interwoven into the piece of paper, glass and frame the Marshal seized. No case is cited by the Appellate Court, or by either of the counsel for the appellees, where a liquor license was held to be subject to execution on fieri facias. On exhaustive examination we have found none. They are all to the contrary.

Hart v. *Pierce*, 42 W. L. R. 825: "It has been repeatedly held and is undoubtedly the law that a liquor license is a privilege and not a right."

Richards v. *Geiger*, 39 D. C. App. 278; 40 W. L. R. 758: "A license to sell intoxicating liquors is a mere permit, personal to the licensee, and is not transferable unless the right is expressly conferred by statute; and then only upon compliance with the provisions of the statute relating to the transfer." (See authorities herein on transfer of license.)

Sec. 136, 30 Am. Jur. 326. "Generally, it is held that a license to sell intoxicating liquor is not property or a vested right. It is not property in any legal or constitutional sense."

Sec. 140, 30 Am. Jur. 328: "A license to sell liquor, being a mere personal privilege, is generally held not to be assignable or transferable except where a statute

> so provides, and *then only in the manner and form prescribed.* Any other rule would defeat the object of the license laws. * * * Where any claimed right under the assignment of a license has no other foundation than the custom of the Board having control of the issuance of licenses, it is subject to any condition which the Board may impose."

The statute makes no provision for sale by the U. S. Marshal. He could not convey title.

> *Sec. 141, 30 Am. Jur. p. 329:* "Generally, a liquor license is not transferred by operation of law. It is generally held that the death of the licensee terminates the license; *it therefore does not become an asset of the estate or give the personal representative of the licensee any right to conduct the business or to make* sales under the license."
>
> *Sec. 142, 30 Am. Jur. p. 329:* "A license or permit to manufacture, sell, or otherwise traffic in intoxicating liquor is not such a property right that it cannot be taken away from the holder except by a judicial proceeding. On the contrary a liquor license is at all times within the control of the legislature * * *."
>
> *Sec. 40, 15 R. C. L. 285:* "Generally, however, and from other viewpoints especially from the standpoint of the right and power of revocation *a liquor license is regarded as anything but a property or contract right.* It is consistently declared to be a mere personal and temporary permit or privilege to do what could not be lawfully done without it, *and not property in any legal or constitutional sense;* and its issuance is a matter not of right but purely of legislative grace and may be extended, limited or denied without violating any constitutional right."

Tracy v. *Ginzberg,* 205 U. S. 170-172, 51 L. Ed. 756-759. Long and Sanderson gave a chattel trust on their liquor business, including the license. Ginzberg became trustee in bankruptcy and procured the transfer of the license to O'Hearn. The complainant, Tracy, held a chattel mortgage

for the benefit of certain breweries. The complainant sought in equity to recover from the trustee moneys received from sale of the license to one nominated by the trustee.

> Mr. Justice Harlan: "The Supreme Judicial Court of Massachusetts affirmed a judgment (dismissing the complaint) holding that to sell intoxicating liquors was a personal privilege valuable as property in a certain sense for the personal use of the holder, *but not assignable or transferable by him in any way.*"

Voight v. *Excise Commissioners of Newark, N. J.*, 59 N. J. L. 358, 36 At. 686, 37 L. R. A. 292. Voight was charged with selling liquor on Sunday against the law. "A license is in no sense property. It is a mere temporary permit to do what otherwise would be illegal issued in the exercise of the Police Power."

Metropolitan Board of Excise v. *Barrie*, 34 N. Y. 657, Counsel "argues that since the passage of the Act of April 1st, 1887 which authorizes Boards of Excise Commissioners in their discretion to transfer any license granted by them * * * to sell liquor is property. But why the fact that a license may now be transferred in this State converts it from a mere privilege to a property right he does not tell us, nor have I been able to perceive, and I have therefore concluded that the contention has nothing to rest upon."

> *Blum* v. *Ford*, 194 Ark. 393, 107 S. W. (2d) 340. "The general statement of the law is contained in 15 R. C. L. 285 as follows: 'Generally, however, and from other viewpoints, especially from the right and power of revocation, a liquor license is regarded as *anything but a property or contract right.* It is consistently declared to be a mere personal and temporary permit or privilege to do what could not be lawfully done without it, *and not property in any legal or constitutional sense.*' * * * A license is not a contract between the government and licensee, and it creates no

vested right any more than does the charter of a social club create rights beyond revocation for violation of the liquor laws."

State vs. Williams, 173 Ind. 414, 422; 90 N. E. 754: "It (the liquor license) does not effect a vested or property right and is a matter for purely legislative grace."

U. S. Fid. & Guaranty Co. vs. Little, 76 N. H. 427; 83 Atl. 513: "Such license when issued is not a contract between the municipality and the licensee in which the latter has a vested right, but it is a mere permit which is not transferable except when such transfer is authorized by ordinance and then only in the manner and form prescribed."

John Barth Co. vs. Brandy, 165 Wisc. 196, 161 N. W. 766: "It has already been held by this Court that such a license is a mere privilege to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee. And from the very nature of things such license is not assignable by law. State vs. Bayne, 100 Wisc. 35."

In Re Ulrich 6 Pa. Dist. Rep. 408. It is held that where the original licensee cannot transfer without the approval of the Court the liquor license cannot be levied upon and sold because the sheriff has no power to make title to the purchaser.

In Re Buck's Estate 185 Pa. 57, 39 Atl. 821: "A license to sell liquor is a personal privilege. It is not assignable by the holder, and at his death it does not go to his representative. It is not an asset of the estate. (Blumenthal's Petition 125 Pa. St. 412, 18 Atl. 395) * * * The privilege however is personal and is not assignable nor does it go to the personal representative at his death.

In Re Grim's estate, 181 Pa. St. 233, 37 Atl. 403: "It is conceded that the widow came into the possession of the stock and fixtures as a purchaser at a fair value; that the license was a purely personal privilege, which did not pass to the executor as an asset; *that the creditors would have had no standing* to object to the

transfer to her. * * * The license granted the decedent was a personal privilege which ended with his life. It was not assignable by him. It did not go to his personal representatives. *It was not an asset of his estate.* (Blumenthal's Petition 125 Pa. St. 412, 18 Atl. 395)."

Feigenspan vs. Mulligan (N. J. Eq.) 51 Atl. 191: The complainant, mortgagee, sold property covered by a chattel mortgage including a license and at public sale bought the property in. The defendant mortgagor refused to deliver the license. *The complainant sought by a writ of replevin to recover it. "The difficulty in dealing with this case largely arises from the erroneous notion which pervades the bill, and so-called chattel mortgage that the thing which constitutes a liquor license is a chattel which is purchased from the municipality, and is capable of sale and delivery and seizure under a writ of replevin.* * * * The complainant in my judgment did not acquire at any time any more absolute title in the intrinsically worthless paper writing which presumably he vainly sought to have seized under a writ of replevin *than he acquired to the valuable Incorporeal right or privilege which the paper writing evidenced.* * * * This license was not generally to keep a beer saloon and restaurant anywhere in Bayonne, but to keep such beer saloon at No. 463 Avenue C and not elsewhere. * * * Our first inquiry relates to the extent to which this Bayonne license to keep a beer saloon and restaurant was assignable. It was undoubtedly assigned by way of mortgage as far as the law would permit. Apart from the effect of recent legislation to be considered later *the law is plain that this license is not property and is not assignable, but is a mere temporary permit, to do what otherwise would be illegal, issued in the exercise of the Police Power.* (*Cases cited.*) * * * *The Supreme Court held (Voight* v. *Excise Commissioners of Newark, N. J., 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292) that the contention that this statute making a license transferable converted a 'mere privilege into a property right' had no basis.*

* * * The difficult case is presented here where the certificate of the license as a chattel is transferable without any limitation, while the privilege to keep a beer saloon and restaurant which it evidences is transferable only in case a condition shall happen within the discretion and control of a third party. * * * *At most what the complainant obtained to secure his loan was a right to have a license transferred and the proceeds of such transfer applied to his debt in case the necessary municipal consent to such transfer should be obtained.* * * * *Moreover, to sell at auction a personal privilege which would only become transferable from the party to whom it was then vested, in case the consent of the municipal authorities to such transfer could be obtained, it was practically to offer a ticket in a lottery.* * * * *There is no power to distrain the certificate and hold it to the inconvenience of the defendants in order to compel the payment of the debt.*"

State v. Lydick, 11 Neb. 366, 371; 9 N. W. 560: "Under statutes much less discriminating than ours it has been held by the Courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York and other states that a liquor license is a personal trust and permit and is incapable of assignment."

E. S. Bonnie & Co. v. *Perry's Trustee,* 117 Ky. 459, 78 S. W. 208: "A license to retail liquor in this state is a personal privilege only. It is confined by statute to the place and person named in the order granting it. * * * When a owner of a license died, or sells his stock or place of business, the authorities can renew the license. * * * They are not required to. * * * *It cannot be sold for debt under execution or attachment. It is an intangible privilege without vendible value or quality.* * * * It is not transferable. The fact that the city council and county court are allowed to transfer it * * * does not give him the right to transfer it. That he has donated it—or attempted to give it—to one of his creditors although insolvent cannot make such creditor liable to the trustee in bankruptcy for the value of the license. *The object of the statute is to hold only that liable to debts which might be subjected by law to their payment.*"

U. S. v. *Overton*, 2 Cranch. CC 42, U. S. Circuit Court for the District of Columbia. "The Court said * * * 'That Mrs. Smallwood had no authority to sell her husband's license. It is a personal trust.' "

McNeely v. *Welz*, 166 N. Y. 124, 59 N. E. 697 (January 10, 1901) Emil Scheillien executed a chattel mortgage which included among other tangible property "all his right, title and interest to a license to sell beer or to a renewal thereof." Execution was issued by Wells & Zerweck on a judgment obtained against Scheillien. The Court said: "*The judgment creditors and their representative, the sheriff, took nothing by virtue of the execution and the attempt to levy thereunder, because a liquor tax certificate is not subject to levy and sale under execution* * * * *It is a mere chose in action which is incapable of seizure or delivery by the sheriff.* * * * While the certificate was personal property it was not a chattel but an intangible right. * * * It is not even assignable without restriction, but only upon the condition that the proposed assignee is eligible under the statute to carry on the business for which such liquor tax certificate was issued on the premises described therein. Furthermore, the assignee is required to make a new application, give a new bond, and obtain consent to the transfer from the officer who issued the certificate. * * * *The judgment creditors therefore acquired no lien on the certificate through their execution and the proceedings thereunder.*"

Hill v. *Sheridan*, 128 Mo. 415, 519. And it is conceded that a dram shop could not be operated in the City of St. Joseph except under license issued by the city. Such license when issued is not a contract between the municipality and the licensee in which the latter has a vested right, but is a mere permit which is not transferable except such transfer be authorized by ordinance and then only in the manner and form prescribed.

State v. *Bayne*, 100 Wisc. 35, 75 N. W. 403: "*Nor are they (liquor Licenses) property in any legal or constitutional sense. They have neither the qualities of a*

contract or of property, but are merely temporary permits to do what otherwise would be an offense against the general law."

Joyce on Intoxicating Liquors, 301.

License as subject to levy and sale: A license being not property but a mere personal privilege *is not regarded as the subject of levy or sale. And so in Pennsylvania it is decided that the sheriff cannot levy upon a license and sell it in the ordinary way, as he cannot make title to a purchaser.*

Black's Intoxicating Liquors Section 130: Hence, both because public policy forbids it and because a license is not in the nature of property, it follows that a license cannot lawfully be assigned or transferred, * * * and because a retailer's license is personal to the holder, *it follows that it cannot be committed to the care of a receiver appointed by the court; the attempt to place a liquor dealer's business in the hands of a receiver would result for this reason in its entire destruction.*

In Re Breen: 13 Pa. Co. Ct. 141 "We are inclined to think that as creditors they have no interest in this question at all. This seems to be warranted from the following quotation from the opinion in the *Blumenthal* case: "While it is true as was said in the *Raudenbusch's* case 120 Pa. 329 'that neither the petitioner nor any other person in this state has any property in the right to sell liquors', yet it is also true that when the state grants a license to a man for that purpose the latter acquires a privilege to sell liquors for a specified time for which he has paid the commonwealth a valuable consideration. *The privilege However is personal and is not assignable, nor does it go to the personal representatives in case of death. Under these circumstances what interest or right has a creditor in the question of whether or not the Court shall transfer the license to another occupant of the House? If, as has been decided, we may transfer a license in the proper case without the consent of the owner to whom the privilege is personal, there would seem to be no reason why his creditors should have to be consulted."*

Analysis of the Opinion of the Court of Appeals.

The Appellate Court says that this license is subject to levy by the United States Marshal because "the said Court may for the purpose of executing a decree issue a *fieri facias* and attachment by way of execution against his lands, tenements, chattels and credits, *or other incorporeal property* to satisfy the decree."

Again the Court says (next to last paragraph), "But whether it is a right, the transfer of which is controllable by a Court or by some other authority, it is nevertheless a valuable right with attributes of property and transferable value in the market of alcoholic beverage distribution." This overlooks the fact that the Marshal can give no title to one cent's worth of interest belonging to the licensee. He cannot compel the licensee to request its transfer in writing as required by Section 17 of the Regulations. It is a worthless thing except, when framed under glass and in the bar room of 4408½ Georgia Avenue controlled by John H. Rowe. The Marshal must sell the property for cash at public auction after 10 days advertisement (Title 15 Sec. 214, 1940 Code) but it can only be transferred on the request in writing of the licensee and when the Alcoholic Beverage Control Board concurs. *The very purpose of the Act is to deprive the holder of the power to transfer.* He can suggest, but no power on earth can make him do so, and his suggestion is utterly worthless unless the Board concurs. The Board can revoke the license for cause. When the Marshal may attach real or personal property, corporeal or incorporeal, he can give title only by his own deed. As to a liquor license he has no such function and can only proceed in the manner and form prescribed as above.

The Appeals Court Citations

They have no application to this case.

Richards v. *Geiger*, 39 App. D. C. 278, 284 we still rely on.

Crowley v. *Christensen,* 137 U. S. 86, 34 L. Ed. 620 cited by appellant below is applicable.

The cases cited in Black's Dictionary (Note 8 of Opinion) are inapplicable for the case does not turn on the abstract meaning of "chattels". The license is not "goods and chattels" under sec. 210, title 15, 1940 Code.

Ager v. *Murray,* 105 U. S. 126, 129 (Note 9) relates to a patent. Its transfer by the holder gives to the transferee the right to produce or manufacture as the inventor could have done. The patentee has an absolute right of transfer. "An owner of a patent has a right to sell it or to keep it"; 20 R. C. L. 65, p. 1186; *Bement* v. *National Harrow Co.* 186 U. S. 70, 46 L. Ed. 1058.

VanNess v. *Hyatt* 38 U. S. 293, (Note 9 of opinion) relates to equities of redemption which at common law were not subject to attachment or levy, but now are. The Marshal can give a good title by his deed when sold according to law.

Mayse v. *Gaddis* 2 App. D. C. 20, 26 (Note 9 of opinion) relates to removing a cloud on title to real estate, and sale of an equity of redemption.

Leonard v. *Baylen Street Wharf Co.* 59 Fla. 547, 52 So. 718, 31 L. R. A. (N. S.) 636 (Note 12 of opinion) is where a license to operate a wharf was given by city of Pensacola to Samuel A. Leonard, his heirs, executors, administrators and assigns. It was properly held that his creditors after death could attach for the franchise was to his assigns, etc.

Deggender v. *Seattle Brewing & Malting Co.* 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626. This is a case under Bankruptcy Law. "If a license to sell liquors is transferable, valuable and is *subject to sale* it is certainly not merely a personal privilege but has all the attributes of property except tangibility and must be treated as property."

A note to the foregoing case on Page 627, 4 L. R. A., N. S. reads as follows: "The holding of the courts that a liquor license shall be considered as an asset in bankruptcy seems

to turn on a peculiar provision of the bankruptcy law, which vests in the trustee all property which prior to the filing of the petition the bankrupt 'could by any means have transferred'." *Fisher* v. *Cushman* 103 F. 860, 865 (Note 15 of the opinion) falls in the same category.

In Re Fisher, 98 Fed. 89. In bankruptcy cases where a licensee became bankrupt the Board of Police Commissioners had made a rule that "where a licensee became bankrupt they would give prior consideration to applicants named by the trustee in bankruptcy."

In Re Becker, 98 Fed. 407. The receiver with the consent of the proper authority caused the transfer of a license from the bankrupt to a "third party for the *benefit of all creditors.*"

Re McArdle, 126 Fed. 442. "The commission (Police Commissioners) of the City of Boston has allowed the licensee's creditors as represented by the trustee in bankruptcy to take the proceeds of the license, *provided these proceeds received by the trustee are to be divided ratably among the creditors.* That the proceeds realized from the sale of a license to sell liquor in Boston are assets of the estate in bankruptcy was decided in re Fisher 98 Fed. 89. *The Court there recognized however that the right to realize the value of the license is a peculiar one available to the Court of bankruptcy only by virtue of the consent of the police Commission.* If the commission does not recognize the interest of the trustee by permitting him to nominate the bankrupt's successor to the license the Court is powerless. In this respect the commission is made the sole judge of what public policy and interest requires. * * * In Re Fisher the rights of the mortgagee were recognized and protected indeed, but the payment to him was not opposed and the refusal of the commission to recognize the mortgagee's rights was not brought to the Court's attention. In fact the District Court then erroneously supposed that the commission itself in some way was accustomed to protect the mortgagee."

There is no comparison between a sale of a liquor license by a U. S. Marshal or Sheriff on a fieri facias and where under the bankruptcy act the bankrupt by virtue of specific law invokes its merciful help to extricate himself from the usual rigors of execution on judgments, on condition that he surrender all his property, corporeal and incorporeal for payment of all his debts pro tanto, and when honestly done he goes forth eventually a new man to rehabilitate himself by further industry, endeavor and thrift. So the bankruptcy act has provided that he surrender all property he "could by any means have transferred."

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 386

JOHN H. ROWE, PETITIONER

v.

JOHN B. COLPOYS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR JOHN B. COLPOYS IN OPPOSITION

OPINIONS BELOW

No opinion was rendered in the United States District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia (R. 43–48) is reported at 137 F. (2d) 249.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered June 28, 1943 (R. 49). The petition for a writ of certiorari was filed September 25, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a license to sell alcoholic beverages issued by the District of Columbia Alcoholic Beverage Control Board is subject to levy on execution to satisfy a judgment of the Municipal Court of the District of Columbia.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in the Appendix (pp. 7–10, *infra*).

STATEMENT

On March 20, 1940, a writ of execution was issued against petitioner and his wife (R. 34–35) upon a judgment of the Municipal Court of the District of Columbia which had been rendered against them in the amount of $143 (R. 36).[1] Petitioner operated a sea food restaurant where food and liquor were sold (R. 10, 26). On April 6, 1940, a Saturday evening, two deputy marshals and a representative of the judgment plaintiff undertook to levy execution on petitioner's property by removing his license to sell beverages, with its frame and glass, and refusing to surrender it until petitioner paid part of the judgment (R. 10,

[1] It was stipulated in oral argument before the Court of Appeals that the judgment of the Municipal Court was valid and that petitioner was liable for its satisfaction (R. 44).

14–15, 16–17). The men were in petitioner's premises from 11:00 p. m. to some twenty minutes before midnight (R. 14, 17). After closing at midnight, petitioner did not reopen until the following Tuesday (R. 17), when the levy was released upon petitioner's making a payment (R. 11–12, 35).

Alleging that his license was not liable to levy and had been improperly seized, resulting in the closing of his restaurant, petitioner together with his wife brought suit for damages in the District Court against respondent Colpoys, United States Marshal for the District of Columbia, the surety on his official bond, and the judgment plaintiff (R. 1–5). Colpoys' answer denied malice and alleged that the levy was in accordance with law (R. 7).

Petitioner introduced evidence as to his gross receipts for both food and beer (R. 17, 18, 20–21), but his attorney conceded that he could present no further evidence to show loss of profits (R. 24). At the conclusion of petitioner's evidence the District Court directed a verdict in defendants' favor on the ground that petitioner had wholly failed to establish the amount of any loss (R. 25–26). The Court of Appeals affirmed, but on the ground that petitioner's interest in the license was properly subject to levy on execution (R. 43–48).

ARGUMENT

No question of substantial or general importance is involved. The only issue presented re-

lates exclusively to the local law of the District of Columbia concerning levy on execution. And as to this the decision below is probably correct.

1. Under the District of Columbia Code (1940 Ed.), the writ of *fieri facias* may be levied on all nonexempt "goods and chattels of the debtor" (§ 15–210), and on his "equitable interest * * * in personal chattels" (§ 15–212). An execution levied on a municipal court judgment becomes "a lien on the personal property of the judgment defendant" (§ 15–209). The court below held that the liquor license issued to petitioner by the District of Columbia Board was a "valuable right, with attributes of property and transferable value, in the market of alcoholic beverage distribution," and hence a "form of property right" subject, together with its "tangible evidence," to execution (R. 48).

The transferability of such a license, upon consent of the proper authorities, is recognized in the Alcoholic Beverage Control Act (D. C. Code (1940 Ed.) §§ 25–106, 25–107, 25–117), and has been judicially acknowledged. Thus, a licensee's interest may be pledged (*In re Fisher,* 98 Fed. 89 (D. Mass.), affirmed, 103 Fed. 860 (C. C. A. 1); *Niles* v. *Mathusa,* 162 N. Y. 546), or converted (*Jaffe* v. *Pacific Brewing & Malting Co.,* 69 Wash. 308; cf. *Bachmann-Bechtel Brewing Co. v. Gehl,* 154 App. Div. 849), or may pass to a trustee in bankruptcy (*In re Becker,* 98 Fed. 407

(E. D. Pa.); *In re Fisher, supra*). Cf. *Commission for Polish Relief* v. *Banca Nationala,* 288 N. Y. 332. In the light of the cited authorities, the decision below can hardly be deemed such a departure from accepted principles as to call for an exercise of this Court's reviewing power. Cf. *Work* v. *United Globe Mines,* 231 U. S. 595. The Court of Appeals did not question the powers of the licensing authority to approve or disapprove a transfer of the license *via* execution. The asserted conflict (Pet. 3) with *Crowley* v. *Christensen,* 137 U. S. 86, and *Richards* v. *Geiger,* 39 App. D. C. 278, is consequently without basis.[2]

2. The question presented is inherently local. Cf. *Tracy* v. *Ginzberg,* 205 U. S. 170; *In re Flaherty,* 184 Fed. 962 (E. D. Va.) The legal attri-

[2] Several circumstances in this case render it an unsuitable vehicle for review of the question involved, even if its importance otherwise warranted it. The suit is for damages allegedly caused by the closing of petitioner's establishment, which he asserts was due to the seizure of the license (R. 3). But in addition to petitioner's failure to prove loss of profits with reasonable certainty (*Di Palma* v. *Weinman*, 16 N. M. 302, affirmed, 232 U. S. 571), there is nothing in the Alcoholic Beverage Control Act which makes it a condition precedent to the sale of beer that the license be on display. And Section 8 (a) of the Alcoholic Beverage Control Regulations (R. 28) does not forbid the sale of beer where the license is withheld through no fault of the licensee. Moreover, the serving of food must be the chief source of revenue at the class D (R. 26) licensed establishment (D. C. Code (1940 Ed.) § 25–103 (n), § 25–111 (h)), and petitioner apparently aggravated his loss, if any, by closing down when he might have continued to serve food.

butes and value of a District of Columbia liquor license depend upon local conditions and administrative practices which are not apparent from the record here. The case thus calls for the application of the settled rule of this Court that questions limited to the District of Columbia ordinarily will not be reviewed on certiorari. See *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285. Cf. *Washington Fidelity Ins. Co.* v. *Burton,* 287 U. S. 97, 100, 102 (dissenting opinion of Mr. Justice Stone); *American Security Co.* v. *District of Columbia,* 224 U. S. 491.

CONCLUSION

The issue presented is purely local and lacks general importance. The decision below is probably correct. It is respectfully submitted that the petition for certiorari should be denied.

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OCTOBER 1943.

APPENDIX

The pertinent sections of the District of Columbia Code, 1940 Edition, are as follows:

§ 11–703. *Jurisdiction — Limited — Exclusive in certain actions.*—The municipal court of the District of Columbia shall have exclusive jurisdiction in the following civil cases in which the claimed value of personal property or the debt or damages claimed, exclusive of interest and costs, does not exceed $1,000, namely, in all civil cases in which the amount claimed to be due for debt or damages arises out of contracts, express or implied * * *.

* * * * *

§ 11–724. *Judgments and executions—Interest.*—* * * The municipal court is authorized to issue writs of execution in all cases in which it is authorized to render judgment.

* * * * *

§ 15–209. *Judgment of municipal court—As a lien—Not levied on real property.*—An execution issued on a judgment of the municipal court shall not be a lien on the personal property of the judgment defendant except from the time when it is actually levied, and then it shall have priority over any execution issued out of said District Court of the United States for the District of Columbia after said levy. It shall not be levied on real estate.

* * * * *

§ 15–210. *On what fieri facias may be levied.*—The writ of fieri facias may be

levied on all goods and chattels of the debtor not exempt as aforesaid * * *.

* * * * *

§ 15–212. *Levy on equitable interest in chattels pledged.*—The interest of the debtor in personal chattels lawfully pledged for the payment of a debt or performance of a contract, or held by a trustee and in which the debtor's interest is only equitable, may be levied upon in the hands of the pledgee or trustee without disturbing the possession of the latter, and the lien thus obtained may be enforced by proceedings in equity. In other cases of equitable interest of the judgment debtor in personal chattels execution may also be levied thereon and the lien thus obtained may be enforced by proceedings in equity. * * *

* * * * *

§ 25–103. *Definitions.* * * * (n) The word "restaurant" means a suitable space in a suitable building, approved by the board, including such suitable space outside of the building and adjoining it as may be approved by the board, kept, used, maintained, advertised, or held out to the public to be a place where meals are served, such space being provided with such adequate kitchen and dining-room equipment and capacity, and having employed therein such number and kinds of employees for preparing, cooking, and serving meals for its guests as shall satisfy the board that such space is intended for use primarily as a place for preparing, cooking, and serving meals, and that the chief source of revenue to be derived from the operation of such place shall be from the preparation, cooking, and serving of meals and not from the sale of beverages. No such space shall be

considered suitable if any business is conducted therein other than the preparation, cooking, and serving of meals, except such a business as is incidental to a bona fide restaurant.

* * * * *

§ 25–106. *Jurisdiction of board over licenses—Appeal from revocation—Duties.*—The right, power, and jurisdiction to issue, transfer, revoke, and suspend all licenses under this chapter shall be vested solely in the board, and the action of the Board on any question of fact shall be final and conclusive * * *.

§ 25–107. *Powers of Commissioners—Rules and regulations—Licenses.* * * *

The Commissioners shall have specific authority to make rules and regulations for the issuance, transfer, and revocation of licenses * * *.

* * * * *

§ 25–111. *License classifications—Fees.* * * * (h) *Retailer's license, class D.*—Such a license shall be issued only for a bona fide restaurant, tavern, hotel, or club, or a passenger-carrying marine vessel serving meals, light lunches, or sandwiches, or a club car or a dining car on a railroad. Such a license shall authorize the holder thereof to sell beer and light wines at the place therein described for consumption only in said place. * * *

The annual fee for such a license shall be $200 * * *.

* * * * *

§ 25–117. *Transfer of license—Fee—Conditions imposed.*—No license shall be transferred by the licensee to any other person or to any other place, except with the written consent of the Board, upon a

> regular application therefor in writing and after notice and hearing, as herein provided for an original application for license, and the fee to be paid by the party applying for such transfer shall be twenty-five dollars, which shall be paid to the Collector of Taxes for the District of Columbia before such transfer is made: *Provided,* That the Board shall not allow the transfer of the license of any person against whom there is pending in the courts or before the Board any charge of keeping a disorderly house, or of violating this law or the laws against gambling in the District of Columbia.

Section 8a of the Alcoholic Beverage Control Regulations provides:

> Every person receiving a license to manufacture or sell beverages shall frame the same under glass and post it conspicuously in his place of business.

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